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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Second periodic report

KENYA*

[27 September 2004]

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Introduction

The Government of the Republic of Kenya has the honour to submit to the Human Rights Committee, pursuant to the provisions of Article 40 of the International Covenant on Civil and Political Rights, its second periodic report under that Covenant.

Article 1

1. Kenya is an independent and sovereign Republic as stipulated by Section 1 of the Constitution of Kenya. In exercise of its sovereignty, Kenyan society has set up a legal structure following the modes and procedures permissible in a State governed by the rule of law.

2. Kenya recognizes the right of peoples to self-determination, and it is one of the guiding principles of its foreign policy. Kenya is party to the UN Charter and other international treaties and conventions and fully subscribes to the principles of independence of nations, primacy of human rights and equality among states. Throughout its history as an independent country, Kenya has been a staunch champion of compliance with the principle of self-determination of peoples. Thus, both in its relations with other States and within international organizations, it has condemned all foreign interference in the internal affairs of any country.

3. Kenya plays an active role in the process of promoting peace and democracy in Eastern and Central Africa. The principle of respect of the right of self-determination of peoples is one of the basic tenets of Kenya's foreign policy, which has enabled the Government to play key role in the search for peace and stability in the region.

4. Within the United Nations, Kenya has shown her sincere and keen attachment to this principle consistently supporting the resolutions of the General Assembly and the resolutions and decisions of the Security Council condemning, and providing for measures to combat interference, invasions by foreign countries, occupation and colonialism and demanding respect of the right of the peoples to elect their own governments and to sovereignty. In the same spirit Kenya has supported the Secretary General in his endeavours to settle these problems through the use of peaceful means in the settlement of international disputes.

5. Kenya shares some of its natural resources with its neighbouring States. To the north is Lake Turkana, shared with Ethiopia. To the south-west is Lake Victoria, shared with Uganda and Tanzania. These resources are utilised for the benefit of the populations surrounding them and the nation at large. For instance, there is a thriving fishing industry in Lake Victoria which provides a source of income of over Kenya shillings 4 billion annually. Kenya does not in any way restrict its neighbours in the use of these shared resources.

Article 2

6. Kenya guarantees to all persons within its territory the right to non-discrimination on any ground, including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Section 70 of the Constitution of Kenya provides that, "Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest."

7. Section 82 (3) of the Constitution provides that the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Section 82 (1) thereof provides that no law shall make any provision that is discriminatory either of itself or in its effect. Section 82 (4) goes on to enumerate that this section shall not apply:

- With respect to persons who are not citizens of Kenya;
- With respect to marriage, adoption, divorce, burial, devolution of property on death or other matters of personal law;
- For the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
- Whereby persons may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having due regard to its nature and to special circumstances pertaining to those persons or to persons of another such description, is reasonably justifiable in a democratic society.

8. The International Covenant on Civil and Political Rights is self-executing. All its provisions are taken care of in the Constitution and other statutes. This is the reason why there is no stand-alone legislation on its domestication. The Civil Procedure Code, the Criminal Procedure Code (see Article 17) and other statutes contain various provisions that are in tandem with the Covenant as detailed in this report.

9. The Children Act for instance in section 5 stipulates that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.

10. The Persons with Disabilities Act, 2003 provides in section 11 that the Government shall take steps to the maximum of its available resources with a view to achieving the full realisation of the rights of persons with disabilities.

11. The National Commission on Gender and Development Act (2004) sets up the National Commission on Gender and Development. Under Section 6 (2) (d) of the Act, the Commission is empowered to formulate programs and advise on the establishment and strengthening of institutional mechanisms which promote gender equity in all spheres of life and in particular, in education, employment and access to national institutions.

12. Under section 91 of the Constitution, a female adult Kenyan citizen does not confer her nationality on her spouse through marriage, yet the converse is true. In order to address this anomaly, the draft constitution has a proposed clause that, if passed, will grant equal rights to both men and women to confer citizenship to their spouses upon marriage. Article 17 of the draft constitution provides that a person who has been married to a citizen of Kenya for a period of at least seven years is entitled, on application, to be registered as a citizen.

13. The Government is well aware that in practice there is discrimination against the woman, the child, the person living with the HIV/AIDS virus and the person with disabilities among others. There are various bodies set up as mentioned above and others like the National Aids Control Council and that run campaigns to raise awareness and to discourage discrimination in their sectors.

14. Kenya is currently undergoing a review of her Constitution. Section 3 of the Constitution of Kenya Review Act provides, inter alia, that the object and purpose of the review of the Constitution is to secure provision therein:

- Guaranteeing peace, national unity and integration of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
- Establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
- Promoting the peoples participation in the governance of the country through democratic, free and fair elections and the devolution of power;
- Respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities.

15. With respect to discriminatory behaviour against persons suffering from HIV/AIDS and the resultant stigmatisation, a Task Force to review the laws related to HIV/AIDS status in Kenya was set up to look at issues of discrimination of persons living with HIV/AIDS in Kenya. The Task Force recommended the following:

- That persons living with HIV/AIDS have a right to good health;
- Access to essential medicine;
- HIV/AIDS education be undertaken countrywide;
- Employment discrimination of persons living with HIV/AIDS be addressed;
- Testing for HIV/AIDS should be generally voluntary;
- Privacy and confidentiality of the tests and their results be upheld at all times.

16. The Task Force also presented the Government with a Bill on HIV/AIDS management for possible enactment as part of its recommendations.

17. The Government has also taken steps to deal with the HIV/AIDS pandemic by, among others, setting up centres countrywide for voluntary counselling and testing of the HIV/AIDS virus and taking measures to reduce the costs of Anti Retro Virals to bring them within reach of the population in general, and particularly the low income earners.

18. Persons aggrieved on any of the grounds covered under this article have access to courts of law, established pursuant to Chapter IV of the Constitution of Kenya. Section 66 of the Constitution provides for the setting up of a High Court of Kenya, which is a superior court of record and has unlimited jurisdiction in civil and criminal matters, and such other jurisdiction and powers as may be conferred to it by the Constitution or any other law.

19. Nevertheless in practice, the larger part of the population does not have access to the formal justice system owing to the complex and formal nature of this process and the attendant expenses. The Government has acknowledged this challenge and has initiated the process of creating access to justice to all persons through alternative dispute resolution techniques in partnership with its development partners.

20. The courts have in the recent past granted judgments to persons as a result of matters brought before them in their judicial review of administrative discretion. This is an emerging and welcome trend in Kenya.

21. We have cited a few Instances of judicial review. The High Court held in a review matter that it has the power to prevent the abuse of process by the Executive arm of Government. In the case of, *Osman Ibrahim Abdullahi versus the Principal Immigration Officer*, the Principal Immigration Officer declared one Mr. Abdullahi a prohibited immigrant without recourse to the due process laid out in the Immigration Act and promptly incarcerated. The court ruled that the process was flawed and that Mr. Abdullahi should be released on bail pending the hearing of the substantive matter on his status as an immigrant. {*Osman Ibrahim Abdullahi versus Principal Immigration Officer; Miscellaneous Application No. 1331 of 2003*}. Similar cases of judicial review include "Kenya National Examinations Council versus the Republic, Civil Appeal No. 266 of 1996 and one between the Republic on the one hand and the Commissioner of Cooperatives, Kirinyaga Tea Growers and Cooperative Savings and Credit Society Limited on the other hand, Civil Appeal No. 39 of 1997.

Article 3

22. Section 82 of the Constitution of Kenya provides for protection from discrimination. Furthermore, the Education Act Cap.211, and the Employment Act Cap.226, provides for equal opportunities to boys and girls, men and women. The Children Act Number 8 of 2001 prohibits both child marriages and female circumcision, which Act domesticates the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

23. However the Criminal Law (Amendment) Act 2003 amended Section 145 of the Penal Code to provide that "Any person who unlawfully and carnally knows any girl under the age of 16 years is guilty of a felony and is liable to imprisonment with hard labour for life." Any

person who attempts to have unlawful carnal knowledge of a girl under the age of 16 years will suffer the same fate. The proviso further states, "*Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the court before which the charge is brought that the person so charged had reasonable cause to believe that the girl was above the age of 16 years or was his wife.*" This is an added challenge that will have to be surmounted taking into consideration the diversity of cultures of various communities in the country.

24. The National Commission on Gender and Development has been set up and is in the process of being made operational. The object and purpose of the Commission is to coordinate and facilitate gender mainstreaming in national development and to advise Government on all aspects thereof.

25. There are numerous Non Governmental Organisations that are active in the field of promoting gender equity in the country.

26. The number of females in wage employment rose from 503,400 in 2002 to 511,100 in 2003, against a national total of 1,727,600. In practice, female participation in activities traditionally dominated by males has remained low. In 2001, there were 495,200 females in employment against 1,176,300 males. This is a 29.5 per cent share of modern sector employment.

27. The majority of females employed in the modern sector (58.2 per cent) were working in the community, social and personal services in 2003 {Republic of Kenya Economic Survey, 2004}.

28. Enforcement of gender equality issues is a challenge. Out of 222 members of Parliament, only 18 are women. Kenya's electoral laws do not discriminate on the basis of sex and allow both men and women of majority age to vote and contest for public offices. It is noteworthy that about 52% of the electorate are women. However, the prevalent values and attitudes among the people make women to generally shy away from elective positions.

29. The Constitution of Kenya prohibits discrimination on the basis of sex. It recognises customary law for the determination of matters of adoption, marriage, divorce, and burial, devolution of property on death or other matters of personal law. This recognition of customary laws brings with it customary practices that are in some cases in practice, discriminatory in their very nature though the spirit of the law was to allow for differentiated treatment that does not amount to discrimination.

30. The Kenya Citizenship Act Cap 170 permits nationality by birth. It is only the father of the infant who confers Kenyan nationality to the child. The ongoing Constitutional review is expected to address this issue, among others. Article 16 of the draft Constitution now proposes that citizenship can be conferred either through the mother or the father.

31. The Judicature Act (Cap 8) provides that jurisdiction of courts must be guided by customary law as far as it is applicable and not repugnant to justice and morality or inconsistent with any written law. Customary laws are mostly unwritten and constantly evolving norms that

exist in parallel with statutory law but derive legitimacy from tradition and custom rather than from an Act of Parliament. Interpretation of customary law quite often favours men over women.

32. The Law of Succession Act (Cap 160), which came into effect in 1981, creates a uniform law of succession for all communities of Kenya save for Muslims. In the case of Muslims Islamic Law applies in the distribution of the estate of a deceased.

33. Section 39 of the Law of Succession states that, "where an intestate has left a surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority; father, or if dead, mother, or if dead ...". This provision discriminates against women in matters of succession and inheritance, as it gives first priority to fathers of deceased persons, then to mothers only if the father is deceased.

34. The said Act further contains provisions that terminate a widow's right to inheritance upon her remarriage.

35. Violations of property rights of women transcend across a range of ethnic groups, social classes, religions and geographic regions. These violations occur at any point in a woman's life.

36. Discrimination suffered by women is largely due to cultural values and attitudes that favour patriarchal structures. There is need to have socialisation that engenders parity of treatment of the sexes. There are various initiatives being carried out by the civil society to promote and protect the welfare of the girl child and the woman. The creation of a Ministry responsible for Gender in the year 2003 is the Government's recognition of the importance of gender equality.

37. The Judiciary has been progressive in recognising the right of women to property by passing judgments that have favoured the rights of spouses to property upon death and divorce. The case of *Karanja versus Karanja*, Kenya Law Reports, 1976, 307 laid down the principle that the wife is entitled to a share of the property acquired by a husband during the subsistence of the marriage. Payments by the wife need not be direct payments towards the purchase of the purchase of property, but may be indirect such as the meeting of household and other expenses which the husband would otherwise have had to pay.

38. This case set the mark for progressively equitable judgments in terms of marital property, as is shown in the case of *Obuya versus Obuya*, High Court Civil Case No. 178 of 1982 (OS) wherein the High Court awarded property equitably between a divorced couple. Another landmark case is *Kivuitu versus Kivuitu*. These cases demonstrate how the Judiciary has progressively ruled in favour of promoting and respecting the right of women (spouses) to property.

Article 4

39. The Constitution of Kenya in Section 85 read together with Section 83 empowers the President of Kenya to declare a state of emergency generally or in any part of Kenya, during which time some of the fundamental rights are suspended. A state of emergency may be declared if the circumstances obtaining in the country are such that governance of the country is

rendered impossible by the legitimate authority and there is a real and imminent threat to the lives and safety of its citizens, in whole or in part. The rights amenable to suspension in Kenya do not derogate from the rights guaranteed under articles 6, 7, 8, 11, 15, 16 and 18 of the International Covenant on Civil and Political Rights.

40. The Preservation of Public Security Act Cap.57 of the Laws of Kenya and the Public Order Act Cap.56 of the Laws of Kenya are two laws that govern the manner in which the restriction of the freedoms of the individual may be imposed. Part III of the Preservation of Public Security Act Chapter 57 of the Laws of Kenya permits the Government to impose the following restrictions in its efforts to restore order in its territory:

- Detention of persons;
- Restriction of the freedom of movement into, out of or within Kenya, compulsory movement of persons and the imposition of curfews;
- Control of aliens, including removal of diplomatic privileges;
- Censorship, control or prohibition of information;
- Control or prohibition of the acquisition of any movable or immovable property;
- Compulsory acquisition of any movable or immovable property;
- Requiring persons to work or render services, and conscription into any of the disciplined forces among other acts of state.

41. Section 83 of the Kenya Constitution provides that the right of personal liberty, against arbitrary search and entry, freedom of expression, freedom of assembly and association, movement, discrimination on grounds of sex, race etc can be suspended.

42. The President's power to declare a state of emergency is not unfettered. Section 85 of the Constitution provides that the President may, by order published in the Kenya Gazette, bring into operation generally or in any part of Kenya, the provisions of Part III of the Preservation of Public Security Act Chapter 57 Laws of Kenya (as in paragraph 29). An order made under this section shall cease to have effect on the expiration of the period of twenty-eight days, unless before that expiration period it has been approved by a resolution of the National Assembly. An order made by the President may be revoked at any time by an order published in the Kenya Gazette. An order made under this section and approved by a resolution of the National Assembly may be revoked by a resolution of the Assembly.

43. From the time Kenya became a signatory to the International Covenant on Civil and Political Rights in 1976, no state of emergency has been declared in the country. In the run-up to the national elections in 1992, there were politically instigated land and tribal clashes that led to many citizens being displaced. The Police and military moved into these areas and restored peace and security. The physical and psychological trauma of the victims of the clashes is still felt to this day.

44. In recognition of this, the Government in 2003 set up a Task Force to establish whether the country was in need of a Truth, Justice and Reconciliation Commission. The Task Force sought views from the victims and those affected by the clashes around the country. It recommended that such a body should be set up so as to act as a beginning of the healing process for the nation.

Article 5

45. As already stated in paragraph 39, the rights amenable to suspension in Kenya do not derogate from those provided for in the International Covenant on Civil and Political Rights. The regime of law in Kenya does not permit the abuse of any of the civil and political rights of individuals as has been indicated.

Article 6

46. Section 71 (1) of the Constitution provides that no person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

47. A person may be deprived of his life under the circumstances mentioned in paragraph 36 in the eventuality of serious and grievous offences, otherwise referred to as capital offences. In Kenya the death penalty may be imposed in four instances; murder under section 204 of the penal code, treason under section 40, and robbery with violence under section 296 (2) and attempted robbery with violence under section 297. If a competent court finds a person accused of committing any of the four mentioned offences guilty, then that person will be sentenced to death.

48. Robbery with violence was not a capital offence until 1976. Increased incidences of the same led to the enhancement of the sentence to death so as to act as a deterrent. To provide for speedy trials and prevent the High Court getting overwhelmed by these cases, which were numerous, the High Court delegated to the Magistrates Courts the authority to try such cases.

49. The appeal process in Kenya is as follows: From the ruling of a magistrate's court, an appeal lies to the High Court. From the High Court a second and final appeal lies to the Court of Appeal, the highest court in Kenya.

50. From the ruling of the High Court, the only appeal lies to the Court of Appeal. The High Court has powers to review its own decisions. Thus a person aggrieved by the judgement of the High Court sitting in its original jurisdiction may seek to have the judgement reviewed by the same court. The Court then sits in an appellate capacity to review its decision. This will not act to prejudice the person against seeking an appeal in the Court of Appeal. Once all appeals have been exhausted, the President may exercise his prerogative of mercy. Under this, prerogative, the President may grant a person convicted of an offence a pardon, either free or subject to lawful conditions (section 27 of the Constitution).

51. The Constitution establishes the Advisory Committee on the Prerogative of Mercy to advise the President before he exercises this right. This Committee often consults with and advises the President on whether cases of persons sentenced to death should be set aside, and then leaves it to the President to use his discretion.

52. At present there is a de facto moratorium on the death penalty in Kenya. The last execution in Kenya in compliance with the death sentence was in 1988.

53. The Penal Code Act provides that a young person below the age of eighteen years of age who commits a capital offence shall not be sentenced to death, but shall be incarcerated at the pleasure of the President. Pregnant women shall also not be sentenced to death if found guilty of the four aforementioned offences.

54. There are 1900 convicts serving in Kenyan jails who have been sentenced to death of these, 200 have exhausted their judicial remedies in terms of seeking to have the death sentence lifted. 1,700 have not yet exhausted their judicial remedies.

55. The Government ensures the protection of even the unborn child, technically called a foetus. The penal code makes abortion an offence. The laws on abortion criminalise acts of the person performing the abortion, the woman seeking to procure her own miscarriage and any person who unlawfully supplies anything whatsoever knowing that it is intended to be used in an abortion. This is given prominence in sections 158-160 of the penal code. The termination of pregnancy is permissible only on medical grounds.

56. In the ongoing process of constitution making, the Government proposed in its submission on the draft constitution that the death penalty should be done away with. The proposal was shot down by the representatives of the people who cited that it is still necessary to keep the death penalty in the statute books. The matter is yet to be concluded as the process of constitution making is still progressing.

57. The Government neither condones nor sanctions extra judicial killings. Any officer of the State who perpetrates such a heinous crime will be punished under the Penal Code for murder and will be dealt with according to the laid down legal procedure.

58. Maternal mortality is defined as death of women from pregnancy-related complications and it is an important indicator of the health status of women. In Kenya, maternal mortality continues to pose a major threat to women of reproductive age and is currently estimated at 365 maternal deaths per 100,000 live births. Lack of population-based data prior to 1994 does not, however, allow a description of time trends.

59. The top three causes of maternal mortality are post-partum haemorrhage (PPH), hypertensive disorders (eclampsia) and maternal infections. Despite the limitations of data on maternal illness and death, an estimated 4,400 women's lives are brought to an abrupt end annually as a result of pregnancy and its complications. The determinants of maternal illness and death in Kenya are multiple and closely interwoven and include medical causes, health service factors, reproductive behaviour and the status of women (MOH, Demographic Health Survey, 1998).

60. In the year 2002, infant mortality stood at 76 per 1,000 live births. The figure has risen from 74 per every 1,000 live births in 1999 and 1998 and 62 per 1,000 live births in 1989. The mortality rate for children less than 5 years per 1,000 live births was 113 in 1999, 112 in 1993 and 92 in 1989. These figures are in an upward spiral indicating increasing difficulties by mothers to adequate medical attention. This is as a result of increased levels of poverty. This is being addressed by the Government through various programs aimed at increasing the levels of heath care. There are mobile clinics run by the Ministry of Health.

61. Malnutrition of children under 5 years of age has dropped from 28 in 1993 to 22.3 in 1999.

62. Life expectancy in Kenya has fallen from 59.5 in 1989 to 47 in 2002. This can be attributed to the HIV/AIDS pandemic.

HIV/AIDS

63. In Kenya, AIDS was first diagnosed in 1984. The number of new AIDS cases reported in one year has been in the average of 12,000 since 1990. Eighty per cent of the cases occur in the age group 15-49 years of age. For every eight adults aged between 15 and 49, one is infected. It is estimated that there are 520 deaths daily from AIDS.

64. The government has taken a number of measures to curb infection. In 2001 the Government declared HIV/AIDS a national disaster and established the National Aids Control Council to carry out extensive education and other interventions. As a result, there are now centres for voluntary testing and counselling in all provinces.

65. The National Aids Control Council has also facilitated the establishment of AIDS Control Units in every government ministry to raise awareness among other activities.

66. On Resource mobilization, the Government has received support locally and from its bilateral donors in financing AIDS control. The annual requirement of HIV research, counseling and prevention is estimated at 40 billion Kenya Pounds excluding the cost of care. Non-Governmental and Community Based Organizations and the private sector are involved in AIDS prevention activities.

Major achievements

- High levels of awareness have been attained;
- Safe blood transfusion methods have been instituted;
- Community sensitization and advocacy at all levels of society is evident;
- HIV surveillance procedures have been instituted;
- There has been involvement of Non Governmental Organization participation;
- The introduction of sessional paper No. 4 of 1997 provided a policy framework within which AIDS prevention and control efforts would be undertaken;

- A third strategic plan for the Kenya National HIV/AIDS and STD control program (1999-2004) was released in August 1999.

Article 7

67. Kenya ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1999 and has taken active steps to implement the provisions of the convention both in its legal and administrative set up. The Government has addressed the issue of torture by the Police Force by introducing a new training manual for the Police that embodies instruction in human rights and respect for them.

68. The Constitution in section 74 (1) provides that "no person shall be subject to torture or to inhuman or degrading punishment or other treatment." The section does however permit corporal punishment. The Penal Code prescribes corporal punishment for those offences that are against public morality and which cause grievous bodily harm.

69. The Criminal Law (Amendment) Act, 2003 abolished the use of corporal punishment under the country's penal laws as corporal punishment is now universally considered to be an inhuman and degrading punishment.

70. The Prisons Act still permits that a prisoner may be put in solitary confinement when he/she has contravened prison rules and regulations in accordance with section 66 and 67 of Prison Rules 1977 Revised. The rules further provide that the longest a prisoner can be put in solitary confinement is 30 days. Section 82 (5) of the Prisons Regulations 1977 Revised also provides that an officer in charge may order any refractory or violent prisoner to be temporarily confined in a separate or special cell.

71. Prisoners who have grievances against the prison authorities may report such grievances, including torture and use of excessive force in the following ways:

- By reporting to the Officer in Charge;
- By reporting to the Prisons officer on duty;
- By reporting to the Visiting Justice on Human Rights;
- By reporting to the Kenya Human Rights Commission; and
- By writing a petition to the High Court.

72. The Government has recognised the critical role the Police play in protection and promotion of human rights and in particular the right to freedom from torture, cruel and inhuman treatment. Towards this end, human rights education has been introduced in the training of police officers. A human rights training manual for the police has been developed and is currently in use.

73. In 1997 the Government enacted the Statute Law (Repeals and Miscellaneous Amendments) Act, 1997, which expressly prohibited torture being used by the Police. The Act amended section 14 of the Police Act (Cap 84 Laws of Kenya) and provided in section 14 (2)

that no police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment. Any police officer who contravenes this provision shall be guilty of a felony. The Committee drafting this report noted that there is no corresponding punishment stipulated in the amendment to buttress this prohibition of torture.

74. The Criminal Law (Amendment) Act 2003 introduced a new provision to the Evidence Act by way of the new section 25A, which provides that, "A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved against such person unless it is made in court," thus making the prospect of torture of an accused person by the Police improbable.

75. The creation of an autonomous security intelligence body and the disbanding of the Special Branch have contributed positively to reduce cases of intimidation and torture by the law enforcement officials. The newly created security agency, the National Security Intelligence Services is run in a transparent manner.

76. Detention without trial was repealed in 1997 by the Inter Party Parliamentary Group, a coalition of members of parliament that met and resolved to ameliorate the human rights situation in Kenya. There has been bilateral and internal training of all persons in the law enforcement field and those charged with administration of justice on the promotion and protection of human rights.

77. As a way of promoting national reconciliation of torture victims, the government acknowledged the use of torture in the past and opened to the public premises used by the former regime as torture chambers as an admission of past errors and to seek reconciliation with those victims of torture.

78. The Government has received a report from a Task Force that it established to evaluate whether Kenya needs a Truth, Justice and Reconciliation Commission in view of the number of persons who have stories of having been tortured by Government officers. The Task Force recommended in this report it submitted to the Government that there is indeed need for such a Commission. The matter is under consideration.

79. The National Council of Science and Technology, is the umbrella organ in the country for authorising research of any kind. For research in the country to be legal, one must obtain the approval from the National Council, which stipulates the conditions under which the research will be approved. If there is need for scientific research on human subjects, then the approval for such research must be obtained. At present there are tests being run on human subjects for an AIDS vaccine. The tests meet the required national and international standards and are being carried out only on volunteers.

80. The Government is at the same time investigating claims of unauthorised research having been carried out on orphans in a Nairobi children's home by certain unscrupulous individuals. They are alleged to have conducted blood tests on the children and exported the samples to the United Kingdom for further testing without the knowledge and approval of the National Council for Science and technology.

Article 8

81. Section 73 of the Constitution prohibits slavery or servitude and no person shall be required to perform forced labour. The Government in the Inter Party Parliamentary Group meetings held in 1997 repealed those provisions of the Chief's Act that authorized the Chief to unilaterally assign community service on persons.

82. Kenya has ratified the Optional Protocol to the Convention on the Rights of the Child and Involvement of Children in Armed Conflict and is signatory to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Children Act prohibits specifically the sale of children and child labour. However, it provides that the Minister may make exceptions through Regulations with respect to children between the ages of 16 and 18.

83. The Penal Code in section 147 provides that anybody who procures or attempts to procure any girl or woman under the age of 21 to have carnal knowledge or to become a prostitute may be given any sentence of imprisonment at the discretion of the court.

84. Kenya is a member of the International Labour Organisation and has ratified the following Conventions:

- Convention number 29 on Forced Labour;
- Convention number 105 on Abolition of Forced Labour;
- Convention number 182 on Elimination of the worst forms of child labour.

85. In practice, the country has a major challenge in dealing with child labour. Due to endemic poverty, parents in some instances still send their children to work in plantations, and in other capacities such as domestic servants to supplement the family income. This happens in spite of the presence of laws prohibiting child labour. The problem is further compounded by the lack of capacity to enforce these laws due to lack of adequate personnel to effectively monitor the situation.

Article 9

86. In Kenya, the right to liberty and security of person is enshrined in the Constitution of Kenya, under Chapter V, Section 72. This section provides that no person shall be deprived of his personal liberty, save as may be authorized by law. Under this provision one can only be deprived of his liberty under the following circumstances:

- In execution of a lawful court order;
- Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Kenya;
- In the case of a minor for purposes of his education or welfare;
- For purposes of preventing the spread of infectious or contagious diseases;

- For purposes of treatment and care or protection of the community in cases of people reasonably suspected to be of unsound mind, drug/alcohol addicts, or vagrants;

- For purposes of lawful deportation or prevention of unlawful entry into the country.

87. Where a person feels that their right has been violated, they have recourse to seek redress with the courts as provided for by section 84 of the Constitution. The provision states in part, "where a person alleges that [his fundamental rights] is being or is likely to be contravened in relation to him, that person may apply to the High Court for redress." There are numerous cases of malicious prosecution against the State that are being heard in the High Court.

88. Under Section 72 (2) of the Constitution, which states that "no person shall be deprived of his personal liberty save as may be authorized by law," a person who is arrested upon reasonable suspicion of having committed an offence he shall be brought to court within 24 hours, and for capital offences, within 14 days. Under Section 37 of the Criminal Procedure Code, if an arrested person is not brought before court within the stipulated time, the investigating Officer is required to make an apprehension report explaining the delay.

89. The Police Training Manual instructs cadets in the manner in which police officers should handle persons when arresting them. In practice the situation is quite different. The Standing Committee on Human Rights (Kenya), the predecessor to the Kenya National Commission on Human Rights, in its annual report of 2002 listed rough handling by the Police during arrest as a prevalent complaint among those persons that have faced arrest.

90. In cases where a person is arrested, prosecuted and subsequently found not guilty by a court of law, the person may sue the Police for malicious prosecution or false imprisonment.

91. In cases where an arrested person has been detained for a long period without being brought to court the arrested person can of his own motion initiate a process to be brought before a court or through a legal representative initiate habeas corpus proceeding in court. This is provided for under section 389 of the Criminal Procedure Code, which gives the court powers to issue directions on the nature of habeas corpus.

92. In order to reduce the length of pre-trial detention Police Officers are empowered to grant bail/bond for minor offences. The court is also empowered to grant bail pending trial in criminal matters before it.

Article 10

93. Kenya has an elaborate system, both legal and administrative, which governs the administration of prisons and other detention centres. This system is based on and generally conforms to the UN Standard Minimum Rules on the Treatment of Offenders.

94. The Kenya Prisons Service Rules were drawn from the UN Standard Minimum Rules for the Treatment of Offenders. The training program for Prisons officers also incorporates Human Rights education.

95. There are a total of 93 prisons in Kenya today categorized as follows:

- Provincial institutions (in all the eight Provinces);
- Medium institutions;
- District prisons;
- Short sentence prisons;
- Borstal institutions;
- Youth Corrective Training Centres.

96. Prison authorities have put in place several measures to ensure separation of different categories of prisoners, such as male, female, and those who are mentally ill. Prisoners are further segregated on the basis of the gravity of the offence. Those serving more than 5 years or are sentenced to death are confined in maximum-security prisons. There are five maximum prisons for men and one for women. Those serving 3-5 years are confined in medium security prisons while those serving less than 3 years are confined in open prisons. Remand prisoners are separated from convicted prisoners.

97. Prisoners have a right to health care. They are often taken to district and provincial hospitals for treatment. Where possible, and where the facilities permit, some prisons have some sort of medical facility where drugs for simple ailments can be dispensed.

98. However there are difficulties faced, as some prisons do not have basic healthcare facilities. This means that the right to access health facilities for some prisoners is fettered. Other health issues in prisons include lack of medicine and the general congestion.

99. Medical aid and support is provided to prisoners that are mentally ill though there challenges. Mentally ill inmates are referred to Muthaiga Referral Hospital which is the only public facility that is capable of dealing with mental health in Kenya.

100. The present holding capacity of prisons is 17,000, yet they hold over 94,220 in 2003. The distribution of the convicted prison population by gender in 2003 depicts large gender imbalance with higher presence of males than females. In 2003 the ratio of male to female stood at 8:1 while prison male population aged between 16 and 17 years was almost twice the number convicted in previous years. The number of convicts in this age group more than doubled from 2,476 in 2002 to 5,465 in 2003.

101. In order to deal with the increased numbers of inmates in Kenyan prisons and to decongest the prisons, Parliament passed the Community Service Orders Act Number 10 of 1998. The Act was established to manage the use of non-custodial sentences for petty offenders. Community service orders are being used to combine the aspects of punishment and rehabilitation. Under section 3 of the Act, only persons who have been convicted to prison terms of three years and below are eligible for placement under the program.

102. The program is run by a Committee comprising the Office of the Attorney General, the Judiciary, Police and Prisons departments, and the Office of the President. Since its inception in 1999 the program has recorded tremendous progress. In 1999, 3,261 persons were accorded placements in the programme. In the first six months of 2004 28,542 persons were placed under this program. At present, a monthly average of 5,000 offenders is placed under the program. The media has on its part also actively run campaigns raise the awareness of the communal benefits for non-custodial sentences with a view of rehabilitating petty offenders.

103. In relation to juvenile offenders the Prisons Department administers two Borstal Institutions (in Kakamega and Shimo la Tewa) and one Youth Corrective Centre each with a daily average population of 400 inmates. Kenya has 11 children rehabilitation schools of which one is for girls. The average capacity of these institutions is 200-300. There are also 11 children remand homes. The Children Department, a department in the Ministry of Home Affairs runs children rehabilitation centres and remand homes.

104. For purposes of rehabilitation, the rehabilitation schools run vocational training and formal education programs. Children in rehabilitation schools pursue both primary and secondary education and take the respective national examinations - the Kenya Certificate of Primary Education (KCPE) and the Kenya Certificate of Secondary Education (KCSE).

105. However there is only one secondary school and it caters for boys. Girls who perform well in KCPE at the only girls' rehabilitation centre/school are supported through State maintenance to pursue secondary school education in regular schools run by the Ministry of Education.

106. In line with the National Standards for Assessment and Classification, categorization of the 11 rehabilitation schools is based on age, educational needs and needs/risk factors.

107. Kenya has put in place a number of measures aimed at accelerating consideration of juvenile cases and improving their conditions of detention. The Children Act No. 8 of 2001, which came into force in 2002, domesticates the 1989 Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. There are ongoing continuous programs to train magistrates further on how to administer children courts. The Children Department under the Ministry of Home Affairs has put in place a pilot Diversion program in four selected districts which principally aims at speeding up juvenile case disposal and ensures that they do not undergo the trauma of the trial process.

108. The Children Act also stipulates that there shall be children courts separate from regular courts wherein the police officers should not wear uniform and the court should be redesigned to make it more child-friendly. This is happening to a large extent.

Article 11

109. In Kenya failure to fulfil a contractual obligation does not constitute a crime. However under the Civil Procedure Act, a judicial authority may order the imprisonment in civil jail of a person for wilful refusal to comply with a lawful court order, such as an order to repay a debt or to perform a specific act. Under this provision the maximum sentence that can be imposed on an offender is six months. Order XXI Rule 28 of the Civil Procedure Rules states that where the

party against whom a decree for the specific performance of a contract, or for an injunction has been passed, has had an opportunity of obeying the decree, and has wilfully failed to obey it, the decree may be enforced by his detention in prison, or by attachment of his property, or by both. It obviously follows therefore that a person cannot be jailed solely for genuine inability to fulfil a contractual obligation.

110. A decree for the payment of money may be executed by the detention in prison of the judgment-debtor, or by the attachment and sale of his property, or by both (Order XXI Rule 26).

111. In such cases the judgment-creditor must deposit in court enough money for the upkeep of the judgment debtor in civil prison. This is an extra burden and is eschewed by many. In practice the courts would not have a person committed to civil jail for inability to satisfy a debt. The person is free to apply for bankruptcy under the Bankruptcy Act so as to protect his property from loss. Failure to apply for bankruptcy may be interpreted as refusal to obey a court order and may attract a jail sentence. It is not a common occurrence for persons to be committed to jail for this though.

Article 12

112. The Constitution of Kenya section 81(1) provides and guarantees that no citizen of Kenya shall be deprived of his freedom of movement, throughout Kenya, the right to reside in any part of Kenya, the right to leave Kenya and immunity from expulsion from Kenya. This freedom may be restricted by law in the interests of defence, public safety or public order, public morality, public health, or in the enforcing of a court order.

113. The Immigration Act further provides entry into the country of immigrants from all countries of the world on an equal basis.

114. Section 4 of the Immigration Act governs admission of aliens into Kenya. Possession of valid travel documents issued by recognized governments, valid entry permits or passes issued by the Government of Kenya, and valid visas where required are the major considerations. Once legally in Kenya, non-citizens enjoy the same rights to move and reside anywhere in the country as citizens.

115. No citizen of Kenya can be deprived of citizenship except naturalized or registered citizens in accordance with section 94 of the Constitution.

116. Kenya is a signatory to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspect of Refugee Problems in Africa. In recognition of the provisions of the said conventions, the Government of Kenya has hosted thousands of refugees in the country, from many countries including Ethiopia, Somalia, Rwanda, Burundi, Sudan and Uganda.

117. The hosting of refugees has posed serious challenges, but with the cooperation and assistance of the United Nations High Commission for Refugees the Government has managed to cope with these challenges. A number of negative effects of hosting large numbers of refugees have been identified, key among which is the proliferation of small arms as well as

environmental degradation. The environmental degradation is being addressed through remedial measures. The Refugees Bill that is in the process of being enacted into law, will govern the way the Government of Kenya handles the refugee situation.

118. The Government has established a Refugee Secretariat in the Ministry of Home Affairs in order to strengthen its capacity to deal with refugee issues. Training of officers in this regard has commenced.

119. The Passport Control Office (which is an administrative section within the Immigration Department) issues travel documents in Kenya. Conditions for the issuance of travel documents include the requirement that applicants must furnish proof of nationality, economic ability to sustain oneself abroad, reason for the intended travel. Minors can apply for travel documents through their parents or guardians. Issuance of passports may be denied in the following circumstances, namely:

- Lack of or delay in proving that one is a citizen of Kenya;
- Production of suspected fake or forged documents, for instance birth certificates and identity cards.

120. Where an application for travel documents is rejected, the aggrieved applicant may appeal to the Passport Control Officer, who is the senior-most officer in the unit. Provision is made for a further appeal to the Principal Immigration Officer. The second last appeal lies to the Minister for the time being in charge of immigration and the final appeal lies to the High Court.

121. The Department of Immigration has issued 912,000 passports from 1976 to date out of a total number of 930,000 applications that have been tendered.

122. There is a discriminatory practice that a mother cannot include the names of her children in her passport without first obtaining her husband's written consent. The husband, though, can include his children's names in his passport without his wife's consent. Yet another discriminatory practice is the requirement for a married woman to obtain a no-objection letter from her husband if she desires to acquire a passport. The converse is not true.

Article 13

123. Section 8 of the Immigration Act, Cap. 172 of the Laws of Kenya as read together with section 26 (a) of the Penal Code Cap. 63 of the Laws of Kenya lay down the procedures for the mandated departure of unwanted aliens from the territory of the State.

124. The reasons for expulsion may include, inter alia, the discovery by immigration authorities that entry permits were obtained through false information, involvement in criminal activities, or activities pre-judicial to the security of the State.

125. An alien may be expelled if the Minister for the time being in charge of Immigration concurs with the recommendation of Immigration Department and declares such a person *persona non grata*. The order by the Minister expelling such a person is addressed to the person and served upon him/her, requiring him or her to depart the country within a stated time period.

126. Should the person be aggrieved by the order he/she can seek relief from the courts. Provision is made for this under Section 8 of the Immigration Act.

127. This provision does not apply to those persons enjoying diplomatic immunity. See case of {Osman Ibrahim Abdullahi versus Principal Immigration Officer; Miscellaneous Application No. 1331 of 2003}, paragraph 21 ibid.

Article 14

128. All persons are guaranteed equality before courts and tribunals by section 77 of the Constitution of Kenya, which provides that persons charged with criminal offences, shall be afforded fair hearing by an independent and impartial court established by law.

129. Persons arrested are informed of reasons thereof upon arrest, and are prosecuted within 24 hours for minor offences and 14 days for capital offences. This is provided for in section 72 (2) of the Constitution. An accused person is presumed to be innocent until proven guilty. The criminal process affords reasonable facilities to arrested persons to build their defences, engage legal counsel of their own choice. In practice the police are known to arrest persons without informing them of the reasons for their arrest, and for charging persons with offences different from those that were actually committed.

130. To further ensure that justice is administered in an open and transparent manner, the actual trial is conducted in open courts save in special cases such as the trial of juveniles. Accused persons are not compelled to confess guilt or testify against themselves.

131. Judgments are pronounced and signed in open court. Convicted persons are entitled to a copy of the judgment. Persons pardoned, acquitted or convicted of offences shall not be charged with the same offence again.

132. Logistical difficulties prevent this from happening with as much efficiency as would be desired. The appeal process is sometimes delayed due to delays in the convicted person obtaining typed proceedings of his trial. This is due to a lack of adequate paralegal personnel, equipment, frequent transfers of magistrates among other difficulties.

133. The Government has enacted amendments to the law that have prohibited torture and introduced confessions only in open court and before a magistrate (see paragraphs 83 and 84).

134. The right of appeal against the judgement of a court is guaranteed. The Kenyan judicial process permits members of the media (local and foreign) access to court proceedings and to record proceedings. Cameras are now allowed to capture proceedings in the courts unless the court declares otherwise for security reasons.

135. Free legal aid in Kenya is availed to persons charged in the High Court with murder. The Government is setting up machinery for the implementation of a legal aid program that will expand the scope of legal aid. There are some Non Governmental Organisations such as Kituo cha Sheria (The Law Centre) and the Federation of Women Lawyers of Kenya (FIDA) that provide free legal services.

136. Kenya ascribes to the principle of separation of powers as per the provisions of section 68 of the Constitution that establishes the Judicial Service Commission. Section 68 (2) provides that, "In the exercise of its functions, the Judicial Service Commission shall not be subject to the direction or control of any other person or authority." It establishes the independence of the Kenyan judicial system. This makes the judiciary independent of the executive, and self-regulating. Section 69 of the Constitution of Kenya regulates the appointment, advancement, and removal of judicial officers, which power vests in the Judicial Service Commission. Judges enjoy security of tenure. In 2003 the Government effected sweeping changes in the Judiciary that saw half of the members of the bench of the High Court suspended on charges of corruption and abuse of office. Some are currently facing tribunals to determine their cases while others opted to retire.

137. Kenya's judicial system has the following courts:

- Children courts, which deal with all matters affecting children;
- Family courts, which deal with matrimonial matters;
- Commercial courts, which deal with all mercantile matters;
- Special anti-corruption courts, which try all graft cases;
- Industrial courts, which deal with labour cases;
- Martial courts, which try offences by military personnel;
- Kadhi's courts which deal with personal laws affecting Muslims.

Article 15

138. Section 77 (4) of the Constitution states that no person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence. Further, no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

139. There is no retroactivity in the Criminal law system of laws in Kenya. A person cannot be charged with an offence for an act committed before any law is legislated against such act. There is compliance with the article.

Article 16

140. Under the Law of Succession Cap 160, a person can bequeath property to unborn child. Under the Penal Code, Cap. 63, procurement of abortion is an offence. The aggregate of the above is that recognition and protection of an individual is guaranteed upon conception.

Article 17

141. The Constitution of Kenya in section 76 guarantees the right to privacy and protection from arbitrary actions of the State. The same section further provides for those circumstances where a person's right to privacy may be curtailed. They are:

142. When the law makes provision for entry into the premises of an individual, such entry should be as is reasonably required in the interests of public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of other property to promote the public benefit.

143. When, by provision of the law, the privacy of a person may be interfered with for the purpose of promoting the rights or freedoms of other persons.

144. When the law so provides, an authorized officer or agent of the Government may enter the premises of a person to inspect it or anything in it for the purpose of a tax, rate or due.

145. The law authorizes, for the purpose of enforcing a judgment or order of a civil court in civil proceedings, the entry upon premises being by court order.

146. A police officer may arrest a person without a warrant if the said person commits a cognizable offence in the presence of the officer. This is provided for in section 64 of the Criminal Procedure Code.

147. The Criminal Procedure Code in section 22 allows a police officer in possession of a warrant to gain entry into premises where he reasonably believes that a person to be arrested is within the premises. The initial step is for the officer to seek permission from the residents of the premises to gain entry. If the residents are not in the premises, and the officer reasonably believes that the person to be arrested may decamp from the premises, then he may break in so as to effect an arrest.

148. The law provides for protection of the right to privacy and there is laid down procedure for the effective and reasonable restriction of this right. Where this right is unlawfully interfered with, there are mechanisms in law to prosecute those who cause such interference.

149. In practice, the matter becomes a little muddled at times because of the fact that a law enforcement officer may claim to have had reasonable suspicion of a person's actions so as to warrant search or even arrest.

Article 18

150. The Constitution of Kenya stipulates in section 78 thereof that every person in Kenya is entitled, except with his own consent, to his freedom of conscience. This freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, to manifest and propagate his religion or belief in public or in private.

151. In Kenya every person has freedom to have a religion of his choice. This is absolute and cannot be restricted by the State. Every person is also entitled to manifest such religion subject to the restrictions contained in law.

152. Likewise, every religious community shall be entitled to establish and maintain places of education for that community. The exception to this rule is that this freedom may be restricted:

- In the interests of defence, public safety, public order, public morality or public health; or
- For the purposes of protecting the rights and freedoms of other persons. Further, restrictions may be imposed on this right if such freedoms are shown not to be reasonably justifiable in a democratic society.

153. The Education Act Chapter 211 Laws of Kenya in section 26 provides that: If the parent of a pupil at a public school requests that the pupil be wholly or partly excused from attending religious worship and religious instruction in the school, the pupil shall be excused such attendance until the request is withdrawn.

154. In practice, some private academic institutions force students to attend religious instructions in a faith they do not ascribe to.

Article 19

155. Section 79 (1) of the Constitution guarantees the individual enjoyment of his freedom of expression and freedom to hold opinions. Limitations to these are contained in section 79 (2) of the Constitution. The limitations are those imposed in the interests of defence, public safety, public order, public morality, public health, and for the protection of the reputations, rights and freedoms of other persons.

156. Any person complaining of violation of the right guaranteed in Section 79 of the Constitution is entitled to seek recourse to the High Court under Section 84 of the Constitution for redress. The court process to many is too tedious and complicated, not to mention expensive. This tends to work against the person alleging that his right has been violated. The issue of delays in the court system are grounded in the fact that there are only about 40 judges for a population of about 30 million Kenyans. The Government is working on a strategy paper through its newly created Ministry of Justice and Constitutional Affairs to create systems for alternative dispute resolution mechanisms.

157. The Kenya National Commission on Human Rights established in 2003 is a statutory and autonomous body that acts as a watchdog to ensure the protection and promotion of human rights in the Country.

158. With regard to greater enjoyment of the right to freedom of expression in the political sphere, particularly the holding of political opinion without interference, the Government adopted the Inter Party Parliamentary Group Reforms of 1997 which sought inter-alia to broaden

the space for political expression including in public broadcasting media. The country has moved quickly in the democratization process and the freedom of expression is a core component of this.

159. Regarding the print media, 4 nationwide newspapers provide a variety of political information and viewpoints. They are the Daily Nation, the East African Standard, Kenya Times and the People newspapers. The Daily Nation and the East African Standard are well established popular privately owned newspapers while the Kenya Times and the People are owned by two different political parties.

160. Regarding broadcasting the country now has 22 radio stations and 13 Television stations licensed.

161. So far there are more than 120 applicants for radio and television stations. There are two major limitations to the expansion of radio and television stations in the country, namely:

- Firstly, there has been, in the past, lack of comprehensive policies and laws to properly guide the licensing process. The Government is working to correct this. In the last two years, the government has been holding discussions with media stakeholders to put together a comprehensive Communication and Media policy to oversee reform, liberalization and modern development of the sector. The draft Communication and Media policy advocates for the growth of 3 parallel types of broadcasting - public broadcasting, private commercial broadcasting and community broadcasting. It is keen on issues of access and multiplication of public spaces for the population, on issues of local content, variety, and participation by ordinary citizens, and is also keen on advocating for rapid building of telecommunication infrastructure in all parts of the country as a support base for the new Information Technology for broadcasting. In addition other support infrastructure such as rural electrification is also addressed in the draft policy;

- The second major limitation is the number of frequencies allocated to Kenya by the International Telecommunication Union (ITU). Currently the frequencies are enough for 13 countrywide television stations and 22 countrywide radio stations. The Draft Communication and Media policy recommends negotiation with ITU for more frequencies for Kenya, while it also encourages investment into cable broadcasting. Another recommendation is on a graduated license regime in terms of costs for the three types of broadcasting with the community media being given concessions in order to encourage the establishment of this sector that will enable the ordinary people to have their own broadcasting stations;

- Another limitation occurs as the Communications Commission of Kenya, issue media houses with frequencies, while the minister in charge of information issues them with licenses to operate. The stakeholders have called for a one-stop clearinghouse arrangement for frequencies and licenses. They recommend that the composition of persons employed in the clearinghouse should be truly representative of the media industry. They have also called for the re-composition of the Communications Commission of Kenya to include broadcast programming and production interests

rather than just the telecommunications technical interests. They would also like the Commission to have a more balanced representation from the communications and media industry.

162. Some other issues which have come up include the establishment of an objective and fair criteria of granting a radio or television station, the sharing out of national broadcasting frequencies, the issue of cross-media ownership, the issue of a graduated licensing fee regime, the issue of subsidies for small rural stations and for overall investment in media in the rural areas, the issue of sustainability for public broadcasting in light of limited resources within Central Government, and the issue of local content ratios in light of globalization. All these issues are being discussed among the various stakeholders.

163. In practice, mass media in Kenya is limited in terms of reach. For the print media, there are distribution constraints. For the electronic media, developmental constraints must be tackled before every part of the country can receive radio and television coverage. Internet connectivity is limited to major urban centres and accessibility to the same is hampered by the accompanying costs.

Article 20

164. The Penal Code Chapter 63 in section 44 expressly prohibits any propaganda for war either directly or indirectly and stipulates a mandatory life sentence for the offence.

165. In addition, the said Code penalizes activities whose effect would be to advocate hatred or incitement to violence or the disobedience of lawful authority. A maximum sentence of three years is prescribed for such an offence. It is worthy to note that the punishment may be imposed by the State for an offence against public order, morality and safety so as to safeguard the rights of all Kenyans to an environment free from anarchy wherein their human rights can be fostered.

Article 21

166. The right to freedom of Assembly is recognized in Kenya and is enshrined in section 80 of the Constitution of Kenya, which also provides the situations under which restriction of the right is permissible. These situations include:

- Where it is reasonably necessary in the interest of defence, public order, public morality or public health;
- Where it is reasonably necessary for protecting the rights or freedom of other person;
- Where a written law imposes restrictions upon public officers, members of a disciplined force or members of a Local Government Authority. These situations must be contained in written law.

167. Provisions regulating the exercise of the right of Assembly are contained in the Public Order Act, Chapter 56 Laws of Kenya. Part III of this Act regulates the conduct of public gatherings. Section 5 provides that any person intending to hold a public meeting or a public

procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession. The regulating officer shall notify the convenor of the meeting if the venue is free or not. The meeting may also be called off if the regulating officer reasonably perceives a threat to public safety, order or peace.

Article 22

168. The right to association is entrenched in the Constitution at section 80. This right allows a person to freely associate with other persons, and in particular to form and belong to trade unions or other associations for the protection of his interests.

169. This right is however subject to the same restrictions as the right to freedom of assembly, viz:

- Restrictions may be imposed if such restriction is permissible in the interests of defence, public safety, public order, public morality or public health; or
- For the purpose of protecting the rights or freedoms of other persons; or
- When such freedom imposes restrictions on public officers, members of disciplined forces, or persons in the service of a local government authority; or if the thing being done in the exercise of this freedom is shown not to be reasonably justifiable in a democratic society.

170. Registration and de-registration of trade unions is done under the provisions of the Trade Unions Act Cap. 233.

171. There are some limitations to the right of Freedom of Association namely:

- Section 11 of Cap. 233 allows the registrar to defer registration of a trade union;
- Section 16 of Cap. 233 gives the registrar powers to refuse to register a trade union;
- Section 17 of Cap. 233 gives the registrar powers to cancel or suspend registration of a trade union.

172. In Kenya a group of 6 or more people have a right to form a Trade Union subject to the controls established by law under Chapter 233 of the Law of Kenya.

173. There are 40 unions registered in Kenya under the Trade Union Act. They are organized along industrial, professional and occupational lines. The Laws and Regulations governing Trade Unions are contained in the Trade Unions Act (Chapter 233), Trade Disputes Act (chapter 234) and the Industrial Relations Charter. The following are some of the registered unions:

Name of Union	Membership
Kenya Union of Printing Publishing Paper	5 661
Manufacturing & Allied Workers	
Transport and Allied Workers	21 972
Tailors and Textiles	13 832
Kudheiha Workers	53 735
Kenya Building Construction, Timber, Furniture & Allied Employees Union	10 520
Kenya Local Government Workers Union	47 623
Kenya Civil Servants Union	120 000
Railway Workers Union	14 150
Dock Workers Union	4 769
Union of Posts and Telecommunication Employees	11 170
Kenya Petroleum Workers	1 170
Kenya Chemical and Allied Workers Union	8 325
National Seamen's Union	350
Kenya National Union of Teachers	186 036
Kenya Engineering Workers Union	6 920
Kenya Shoe and Leather	3 380
Kenya Union of Sugar Plantation Workers	7 900
Kenya Quarry and Mine Workers Union	12 100
Kenya Union of Journalists	175
Kenya Game Hunting and Safari Workers Union	5 209
Kenya Plantation and Agricultural Workers	38 674
Kenya Union of Entertainment and Music Industry	391
Central Organization of Trade Unions (K)	
Kenya Union of Commercial Food and Allied Workers	33 330
Kenya Airline Pilots Association	111
Kenya National Union of Fishermen Workers	423
Amalgamated Union of Kenya Metal Workers	10 385
Kenya Jockey and Betting Workers	561

Name of Union	Membership
Kenya Scientific Research, International Technical and Allied Instruments Workers Union	550
Bakery Confectionery Manufacturing and Allied Workers Union (K)	22 810
Kenya Union of Employees of Voluntary Association, Trade Unions and Allied Organization	66
Kenya Electrical Trades and Allied Workers Union (KETAWU)	5 470
Banking, Insurance and Finance Union	2 972
Kenya Shipping, Clearing and Warehouses Workers Union	565

This list is not exhaustive, but is a random selection of unions that are active in various sectors of the country.

174. In order to ensure that Kenya's Labour Laws conform to the standards and other international conventions, the government in the year 2001, established a task force to review all the Labour Laws. The Terms of Reference for the Task Force were as follows:

- To examine and Review all the Labour laws including the employment Act Cap. 226, Regulations of Wages and Conditions of employment Act Cap. 229, The Trade Unions Act Cap. 233, The Trade Disputes Act Cap. 234, Workmen's Compensation Act Cap. 236. The factories Act Cap. 514 and make recommendations for appropriate legislation to replace or amend any of the labour law;

- To make recommendations on proposals for reform amendment of labour laws to ensure that they are consistent with the conventions and recommendations of the International Labour Organization to which Kenya is a party; and

- To make Recommendations on such other matters related to the foregoing.

175. The task force has completed its work and submitted recommendations to the Government. In addition, Kenya ratified 7 of the core ILO Conventions save for ILO Convention No. 87 and the process of domestication is underway. Kenya has consistently made annual and periodic reports as per the ILO Constitution.

176. Laws of Kenya allow for the formation and registration of associations and groups working for the promotion of Human Rights. Regulations and controls in respect of these associations are contained in the Non-Governmental Organizations Co-ordination Act.

177. Presently, there are about 2,224 registered Non governmental Organizations in the country, with only 125 applications for registration pending.

Article 23

178. A family in the Kenyan context falls under three categories-the extended, nuclear and single parent families. The extended family's role, while still of great impact in society, is waning due to the migration of persons to urban centres where nuclear and single-parent families are more prevalent.

179. Marriage under Kenyan law is governed by any one of the 5 prevailing regimes governing solemnization of marriages in Kenya, namely:

- The Marriage Act, Chapter 150;
- The African Christian Marriage and Divorce Act Cap. 151;
- Matrimonial Causes Act Cap. 152;
- Mohammedan Marriage, Divorce and Succession Act Cap. 156; and
- Hindu Marriage Act Cap. 157.

180. The marriage laws cited above govern and bring order and stability to marriages. They also define marital offences and set out the consequences one would face in the event one committed the offences. The ultimate sanction is divorce.

181. The Matrimonial Causes Act Cap. 152 of the Laws of Kenya lays down the mechanisms for the granting of divorce and judicial separation. Certain specific grounds are provided upon which such applications can be brought before the competent courts of the land. The spouse bringing a divorce cause can only do so three years after the celebration of the marriage. This is provided in section 6 of the Matrimonial Causes Act. The courts in practice do all that is possible to encourage spouses to try and work out their differences before granting divorce. In Kenya spouses are prohibited from colluding to seek divorce. Section 8 thereof gives the following as grounds upon which one may bring a divorce action:

(a) Adultery;

(b) Cruelty;

(c) Desertion for a period of at least three years;

(d) That the spouse is incurably of unsound mind;

(e) That since the celebration of the marriage, the spouse has been guilty of rape, sodomy or bestiality.

182. Marriage has not been defined in our Statutes. However in Kenyan society, marriage is considered to be a union between a man and a woman. Homosexuality is considered unnatural act punishable under the penal code. Section 162 of the Penal Code provides that any person who has carnal knowledge of any person against the order of nature, or has carnal knowledge of

an animal, or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for between fourteen and twenty one years.

183. Couples who are cohabiting are not offered protection under the law. However, the Children Act Number 8 of 2001 protects the children that are born of parents who are cohabiting and not married to each other. It provides that if a couple has lived together for 12 months cumulatively, then the children born of their association shall be entitled to maintenance by both parents. The Children Act provides in section 24 (3) that where a child's father and mother were not married to each other at the time of the child's birth and have not consequently married each other, the mother shall have parental responsibility at the first instance. The father shall subsequently acquire parental responsibility ether through an application in court for that purpose or where he has acknowledged paternity of the child or has maintained the child.

184. Courts in Kenya have as a matter of judicial precedence held that a marriage will be presumed to subsist if the couple cohabit and present themselves to the world as husband and wife. This was the judgment of the court in *Peter Hinga versus Mary Wanjiku, Civil Appeal No. 94 of 1977*, and *Hortensia Wanjiku Yawe versus Public Trustee, Civil Appeal No. 13 of 1976*. In another similar ruling in *Stephen Mambo versus Mary Wambui, Civil Appeal No. 3 of 1976*, the court held that long cohabitation as man and wife gives rise to a presumption of marriage and only cogent evidence to the contrary can rebut such a presumption.

185. The Children Act No. 8 of 2001 together with the Matrimonial Causes Act Cap. 152 protects particularly the interests of minors in the areas of custody and maintenance. Furthermore, the Children Act confers visiting rights upon a parent divested of custody of the children. This is provided in section 83 (2) of the Children Act.

186. Men and women are deemed equal in the marriage union by law and they share equal responsibilities towards their children. The ownership of property acquired before marriage is deemed individual property. All property acquired during the marriage period is considered matrimonial property and therefore each spouse has an equal share in the same. Nevertheless each spouse is entitled to own property in his/her own name. Kindly refer to Article 3 herein for citations of case law that apply to matrimonial property.

Article 24

187. Kenya has ratified the Convention on the Rights of the Child 1989 and the African Charter on the Rights and Welfare of the Child. Most of the provisions of these treaties have been incorporated in the Children Act.

188. Section 5 of the Children Act prohibits discrimination of children on grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence, or local connection. Contravention of this guarantee is an offence punishable by an eighteen-month jail term under section 20 thereof.

189. Section 11 of the Act provides that every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide appropriate assistance and protection, with a view to establishing his identity.

190. In civil matters, a child attains the age of majority at 18 years. In criminal matters, the age of assuming criminal responsibility is 8 years.

191. In labour matters, the age of majority is 18 years, but section 10 (4) of the Act lays down an exception which permits minors aged 16 to be employed under conditions specified by ministerial regulations made pursuant to that section.

192. To assist the family in discharging its responsibilities towards the child, Kenya has provided the necessary legislative framework aimed towards mainstreaming children issues in government planning through the Medium Term Expenditure Framework (2004-2007). The Children Act simplifies adoption and foster care placement, which does away with the cumbersome procedures that hitherto burdened the process. However the adoption process is still relatively tedious.

193. Section 4 (3) of the Children Act require all judicial and administrative institutions and all persons acting in the name of these institutions where they are exercising any powers conferred by the Children Act to treat the interest of the child as the first and paramount consideration.

194. Cultural practices and economic disparities are major challenges affecting the principle of non-discrimination and protection of the rights of the child.

195. Additional challenges to the implementation of this Act are female circumcision, child marriages and persons with disabilities among others.

Article 25

196. Kenya is divided into electoral units known as constituencies. At present there are two hundred and ten constituencies with such boundaries as may be prescribed by the Electoral Commission of Kenya. This body is a constitutional body established under section 42 of the Constitution.

197. Kenya ascribes to the principle of universal suffrage, which in practice does provide for the representation of minorities in the electoral process. One becomes eligible to vote and to be registered as a voter in the elections upon attaining the age of majority, 18 years. There is no discrimination based on sex. For one to be eligible to vote, one must be a citizen of Kenya. Section 43 of the Constitution goes further to detail that one shall be disqualified from being registered as a voter:

- If one is detained in lawful custody;
- If the said person is adjudged or declared to be of unsound mind by a competent authority; or
- If he has been convicted of an offence connected with elections;
- If one is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under a law in force in Kenya.

198. The minimum age for a person who wishes to stand for elections is 21 years. The Constitution provides that for a person to run for the presidency the person must be at the very least 35 years old. There are no other requirements that a person aspiring for parliamentary office must meet.

199. The Electoral Commission of Kenya supervises the conduct of elections. Elections are conducted by secret ballot every five years. In the event that there is a dispute in the results at an election, then the aggrieved person may petition the High court, which has jurisdiction to hear and determine issues arising out of elections.

200. There is a proposal in the draft constitution to fund political parties from a Fund to be administered by the Electoral Commission in order to provide financial support to registered political parties in the discharge of their roles and functions.

201. There is a proposal in the draft constitution for special arrangements to accord members of disciplined forces, staff of Kenya's diplomatic Mission, citizens outside Kenya, prisoners, Election Officials and patients in hospitals the opportunity to vote.

202. The challenges faced have been addressed in Article 3 paragraph 25.

203. These challenges are of a socio-cultural nature as statistically women constitute 52% of the registered voters in the country.

204. It is necessary to point out that Kenya has held elections nine times since independence. Even though the political scene was dominated by one party for the first thirty nine years of our independence Kenyans were free to choose their representative as demonstrated by the high turnover of Members of Parliament in every election.

205. It is only in 2002 that the political party KANU which had ruled Kenya since independence lost at the general elections to the National Rainbow Coalition - a coalition of fourteen parties - in a peaceful and democratic election that brought in a new administration.

Article 26

206. The Constitution of Kenya does not have a single expressing stating that every person is equal before the law and is entitled without any discrimination to the equal protection of the law. In contrast, this principle is to be found spread out in Chapter V of the Constitution of Kenya dealing with fundamental human rights.

207. Section 77 for instance lays out intricate processes that ensure that every human being in Kenya is accorded equal treatment when charged in the court process for an offence. Section 70 offers protection of fundamental rights and freedoms of the individual while section 82 (1) provides that no law shall make any provision that is discriminatory either of itself or in its effect.

208. There are various other provisions that if read in tandem espouse the principle as laid out in the International Covenant on Civil and Political Rights.

209. Equality before the law in practice is addressed in other sections of this report the disadvantage that women and children face in light of the cultural and social set up of the country, especially in relation to personal law.

210. The draft constitution has a provision that seeks to level the disparity facing women. In the proposed Bill of Rights of the draft Constitution, Article 37 proposes, "Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social activities. Women and men have an equal right to inherit, have access to and manage property."

211. When it comes to persons of different social and economic strata, the protection of the law works just as evenly. All are subjected to custody in police stations and other detention facilities. There are some high profile persons in custody in the country today, sharing the detention facilities with other Kenyans from all walks of life.

Article 27

212. There exist in Kenya cultural and tribal minorities such as the Ogieks (who number around 15,000 nationally), Njemps, El Molo, Sengwer and Nubians among others. While in the past the Government did not take any active measures to preserve and protect these minorities, there has been a gradual acceptance of their status and there are efforts being made to not only recognise these minorities, but also encourage their survival and protection.

213. The Government notes that issues of minorities are closely linked to land rights in Kenya and the Government is taking proactive measures to address these issues.

Annexures

1. CONSTITUTION OF KENYA
2. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
3. CHILDREN ACT 2001
4. THE PERSONS WITH DISABILITIES ACT 2003
5. THE NATIONAL COMMISSION ON GENDER AND DEVELOPMENT ACT (2004)
6. EDUCATION ACT CAP. 211
7. THE EMPLOYMENT ACT CAP. 226
8. IMMIGRATION ACT CAP. 172
9. KENYA CITIZENSHIP ACT CAP. 170
10. THE JUDICATURE ACT (CAP. 8)
11. THE PRESERVATION OF PUBLIC SECURITY ACT CAP. 57
12. THE PUBLIC ORDER ACT CAP. 56
13. THE LAW OF SUCCESSION ACT CAP. 160
14. THE PENAL CODE CAP. 63
15. THE CIVIL PROCEDURE ACT
16. CRIMINAL LAW (AMENDMENT) ACT 2003
17. THE MARRIAGE ACT, CHAPTER 150
18. THE AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ACT CAP. 151
19. MATRIMONIAL CAUSES ACT CAP. 152
20. MOHAMMEDAN MARRIAGE, DIVORCE AND SUCCESSION ACT CAP. 156
21. HINDU MARRIAGE ACT CAP. 157
22. THE PRISONS ACT
23. THE POLICE ACT CAP. 84
24. REGULATIONS OF WAGES AND CONDITIONS OF EMPLOYMENT ACT CAP. 229

25. THE TRADE UNIONS ACT CAP. 233

26. THE TRADE DISPUTES ACT CAP. 234

27. WORKMEN'S COMPENSATION ACT CAP. 236

28. THE FACTORIES ACT CAP. 514

29. THE KENYA PRISONS SERVICE RULES

30. KENYA POPULATION CENSUS, 1999 ANALYTICAL REPORT VOLUME VII

31. KENYA ECONOMIC SURVEY 2004

32. SELECTED CASE LAW